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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JEFFREY A. BEARD, SECRETARY,
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

Petitioner,

—v.—

RONALD BANKS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF PENNSYLVANIA, THE LEGAL AID SOCIETY, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AMERICAN FRIENDS SERVICE COMMITTEE, AND CALIFORNIA PRISON FOCUS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The statements of interest of the *amici curiae* are set forth in the Appendix.

STATEMENT OF THE CASE

Opened in April 2000, the Long Term Segregation Unit (LTSU) at SCI-Pittsburgh is designed to make life as unpleasant as possible for those prisoners who are deemed incorrigible and recalcitrant by prison administrators. Respondents are a class of all "current and future [Level] 2 Long Term Segregation inmates." J.A. 3.

Respondents are subject to nearly total isolation and idleness. They are locked in their cells for all but one hour each day, and are prohibited from purchasing commissary items and engaging in educational activities, group religious services and prison jobs. J.A. 32-33, 38, 100, 102. Human contact is limited to a few prison employees, legal counsel and once-a-month, one hour, weekday visits from immediate family members. J.A. 48, 98. Telephone calls are permitted only in emergencies. J.A. 48, 102.

Respondents are isolated not only from other people, but also from current thoughts and ideas. The challenged policy prohibits Respondents from receiving or reading all non-religious newspapers, magazines and articles cut out of newspapers and magazines, unless the article relates to the prisoner or a family member. J.A. 48, 91, 102. Respondents are also prohibited from ordering books, watching television

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the amici curiae made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

and listening to the radio. J.A. 102. As a result, they are completely cut off from public affairs and other current political, social, moral, aesthetic and educational news and commentary.

Respondent Ronald Banks filed a lawsuit under 42 U.S.C. § 1983, challenging Petitioner's ban on newspapers and magazines as a First Amendment violation. The United States District Court for the Western District of Pennsylvania granted Banks' motion for class certification, but later denied Respondents' motion for summary judgment and granted Petitioner's, concluding that Petitioner's asserted interests in security and rehabilitation were reasonably related to the ban, under *Turner v. Safley*, 482 U.S. 78 (1987). The Court of Appeals for the Third Circuit reversed the order granting Petitioner's motion for summary judgment and remanded for further proceedings. *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005). The court concluded that Petitioner was not entitled to judgment as a matter of law under *Turner*, with respect to either a security or rehabilitation rationale.

The Third Circuit denied Beard's petition for rehearing *en banc*, and this Court granted *certiorari*.

SUMMARY OF THE ARGUMENT

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court set forth a multi-factor test for evaluating many, but not all, constitutional claims brought by prisoners. As the Court has subsequently explained, *Turner* establishes a deferential standard of review that is most appropriate when considering "regulations that are centrally concerned with the maintenance of order and security." *Thornburgh v. Abbott*, 490 U.S. 401, 409-10 (1989). In addition, the Court has applied *Turner* deference when it has concluded that the rights asserted by prisoner plaintiffs are inconsistent with the fact of incarceration. *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

This case fits neither category. The "primary"

justification for the challenged publication ban is not security but general deterrence or what Petitioner has described as "behavior modification," an amorphous, ill-defined and potentially boundless interest. Conversely, the right asserted by Respondents – reading news and commentary – is entirely consistent with their status as prisoners and, if anything, assists their eventual reentry to society by allowing them to remain informed citizens.

Amici are aware of no decision, from this Court or any other court, that has ever sustained such a sweeping restriction of prisoners' First Amendment rights. Nor has this Court ever approved a challenged prison restriction based solely on such a potentially limitless rationale as general deterrence. Although Petitioner argues that a ruling in his favor involves no more than an application of well-settled principles, Petitioner's construction of *Turner* has no logical stopping point. If his arguments are accepted, there will be nothing left of the First Amendment for prisoners because any restriction on prisoner rights, whether it applies only to "recalcitrant" prisoners or to prisoners in general population, could be justified on the ground of general deterrence. Only the Eighth Amendment will remain as a potential substantive limit on deprivations imposed on prisoners.

These factors strongly counsel against applying *Turner* and argue instead for requiring "a closer fit," *Thornburgh*, 490 U.S. at 412, between Petitioner's asserted interest and the means employed to further it. Alternatively, if the Court determines that *Turner* provides the appropriate standard, it is critical that the Court conduct a searching inquiry under *Turner* into whether Petitioner's policy constitutes an "exaggerated response" to the state's asserted interests. Petitioner can only prevail if *Turner* is "toothless," and this Court has clearly held that it is not. *Thornburgh*, 490 U.S. at 414.

ARGUMENT

I. *TURNER* DEFERENCE IS INAPPROPRIATE ON THE FACTS OF THIS CASE

Although there is language in this Court's opinions suggesting that *Turner* is a "unitary" standard, *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), and that it "applies to all circumstances in which the needs of prison administration implicate constitutional rights," *Washington v. Harper*, 494 U.S. 210, 224 (1990), the Court's actual practice has been more nuanced. Just last Term, the Court declined to apply *Turner* when reviewing a claim of racial segregation. *Johnson v. California*, 543 U.S. 499, 509-510 (2005). The Court has also recognized that the interests asserted by the government are necessarily relevant in determining whether *Turner* applies. *Thornburgh*, 490 U.S. at 412.

In this case, the Court should hold that *Turner* is inapplicable for several reasons. First, Petitioner's interest in general deterrence does not implicate security or other core needs of "running a prison," *Turner*, 482 U.S. at 84. Second, the right to read news and commentary is not only consistent with incarceration, it is a critical means by which prisoners maintain their status as citizens. Third, given the amorphous and boundless nature of Petitioner's deterrence interest, any reliance on *Turner*'s deferential standard threatens the continuing viability of the First Amendment in the prison context. Accordingly, the Court should require "a closer fit," *Thornburgh*, 490 U.S. at 412, between Petitioner's means and ends. *E.g.*, *Procunier v. Martinez*, 416 U.S. 396, 414 (1974) (requiring prison officials to show that regulation is "generally necessary to protect . . . legitimate government interests").

Because *amici* do not believe the challenged policy can survive *Turner* scrutiny, *see* Part II, *infra*, it plainly cannot survive the more exacting scrutiny that is required if *Turner* does not apply.

A. An amorphous interest in general deterrence is not entitled to *Turner* deference

"Behavior modification" is the "primary reason" asserted by Petitioner as justification for his policy prohibiting Respondents from reading all non-religious newspapers and magazines.[2] J.A. 197. *See also* Br. for Pet. at 4. Petitioner asserts a "hope" that making life as unpleasant as possible will both force Respondents to improve their behavior and deter others from misbehaving. *Banks*, 399 F.3d at 142. Such a boundless and ill-defined goal should be rejected as illegitimate where it is used as an excuse to limit First Amendment rights. At the very least, Petitioner's interest should be assessed under heightened scrutiny.

Petitioner characterizes his interest as one of "rehabilitation," which the Court has recognized as legitimate, although never as the sole justification for a restriction. *E.g.*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351 (1987). However, Petitioner's attempt to shoehorn his policy into the box of

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[2] In the courts below, Petitioner asserted two justifications for his policy, an interest in "rehabilitation," which *amici* suggest is more accurately characterized as "general deterrence" or "behavior modification," and an interest in "security," specifically, the potential danger caused by allowing Respondents to handle periodicals. This brief does not focus on Petitioner's security interest, which the Court of Appeals correctly found is not reasonably related to the ban on newspapers and magazines. As stated in the court's opinion, the policy is an "exaggerated response" to any security concerns. *Banks*, 399 F.3d at 146-47. One obvious alternative would be to limit the number of newspapers and magazines that Respondents may keep in their cell and take them away from those who abuse them. Because Petitioner already allows Respondents to keep up to "one records box of religious materials," J.A. 178, there would be no cost to extending this policy to other publications.

"rehabilitation" is inconsistent with common sense and this Court's and other courts' understanding of the term.

The ordinary meaning of "rehabilitation" is preparation for release back into society. *See McKune v. Lile*, 536 U.S. 24, 36 (2002) (plurality opinion) (noting that rehabilitation is objective of corrections system because "most offenders will eventually return to society"). In a constitutional democracy, however, any conception of rehabilitation must include allowing prisoners to become or remain informed and engaged citizens. Petitioner's policy has precisely the opposite effect

To the extent that deprivation is used as a means of rehabilitation, there is generally a specific goal targeting specific behavior, often related to the prisoner's conviction. *E.g., McKune*, 536 U.S. at 30; *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 639 (7th Cir. 2005) (Posner, J.). Here, Petitioner's interest in "rehabilitation" is vague at best, which by itself should heighten the Court's skepticism of its legitimacy. Petitioner is not targeting behavior related to Respondents' convictions – he is not targeting any specific behavior at all. Moreover, the conduct he is prohibiting is unrelated to Petitioner's determination that Respondents are "recalcitrant and incorrigible," Br. for Pet. at 4, as there is nothing in the record to suggest that a significant number of Respondents have abused newspapers or magazines in the past or were transferred to the LTSU because of such conduct.

Although Petitioner claims that the ban on newspapers and magazines is not intended to suppress expression, that is undoubtedly its effect. And at least on some level, that is Petitioner's purpose: he censors nearly all incoming publications primarily because he believes that doing so will make life more miserable for Respondents. Under such circumstances, it becomes difficult to distinguish Petitioner's motives from those the Court has condemned in the past, particularly where Petitioner has so many other ways to modify Respondents' behavior, including withdrawing privileges that do not

implicate First Amendment rights. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) (concluding that law was motivated by animus in part because it inflicted "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it").[3]

However, even assuming that Petitioner's general interest in deterrence is legitimate on its face, it is not entitled to *Turner* deference. This Court has never afforded that level of deference to such an interest, but rather has consistently identified security as the most important goal of a prison and the interest that is most entitled to deference. *E.g., Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."). In fact, in *every* case in which the Court has upheld a prison policy against a First Amendment challenge, the Court has emphasized the detrimental impact that the behavior could have on safety, order or security. *E.g., Shaw*, 532 U.S. at 231; *Thornburgh*, 490 U.S. at 416-17; *O'Lone*, 482 U.S. at 350-51; *Turner*, 482 U.S. at 91-92; *Bell v. Wolfish*, 441 U.S. 520, 550 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977); *Pell*, 417 U.S. at 827.

These cases show that determining the appropriate standard of review is closely tied to the nature of the risk involved in the event of an erroneous decision. Government actors need greatest discretion where limiting it could have serious consequences for personal safety. But where giving greater protection to constitutional rights does not entail a

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[3] *See also Spellman v. Hopper*, 95 F.Supp.2d 1267, 1281 (M.D. Ala. 1999) (stating that it is "questionable" whether it is legitimate interest to punish prisoners "for being problem inmates in general"), *Guajardo v. Estelle*, 568 F. Supp. 1354, 1366 (S.D. Tex. 1983) (holding that prison officials "may not infringe upon first amendment rights of an inmate in solitary confinement solely to enhance the punishment")

credible risk of harm, the need for deference is diminished significantly, and a heightened standard of review is appropriate.

Thornburgh provides support for this approach. In that case, the Court explained that it had departed from the heightened scrutiny of *Martinez* in later cases, such as *Turner*, because "such a strict standard simply was not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security." *Thornburgh*, 490 U.S. at 409-10. In *Martinez*, less deference was appropriate because the outgoing correspondence at issue did not "pose a serious threat to prison order and security." *Thornburgh*, 490 U.S. at 411. More generally, *Thornburgh* makes clear that where the government's asserted interest does not require the same degree of discretion as a security interest, "*a closer fit between the regulation and the purpose it serves may safely be required*." 490 U.S. at 412 (emphasis added). Because in this case neither the form nor the content of the banned materials implicate security, the Court should require a "closer fit" between the publications ban and Petitioner's asserted interest in deterrence.

More fundamentally, applying *Turner* to Petitioner's general deterrence interest is simply incompatible with *Turner*'s four-factor test, at least as Petitioner seeks to apply it. As pointed out by Judge Tatel in *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 239-40 (D.C. Cir. 2003) (Tatel, J., concurring in part and dissenting in part), evaluating a prison's interest in general deterrence under *Turner* is a nonsensical exercise if the government's assertions are taken at face value. In this case, if one accepts Petitioner's theory that depriving prisoners of constitutional rights will improve behavior, there can be no "exaggerated response" to any policy enacted to further this interest because the more severe the restriction, the more likely it will deter. Any accommodation of the prisoner's First Amendment rights, no matter how easily and inexpen-

sively implemented, could undercut that interest.

Petitioner's argument has no stopping point, because all prison policies that restrict constitutional rights could be defended on the basis of deterrence. Although Petitioner claims that Respondents represent the "worst of the worst" prisoners, constitutional deprivations imposed on prisoners in general population equally could be justified as intended to make the prison sufficiently miserable so as to deter both prisoners (from reoffending after release) and those outside the prison (from committing their own crimes). *See, e.g., Kimberlin v. U.S. Dep't of Justice*, 150 F.Supp.2d 36, 45 (D.D.C. 2001) (upholding ban on musical instruments for general population prisoners on ground of deterrence, "[t]hat is, prisons should be seen as a terrible place to effectively deter crime"), *aff'd on other grounds*, 318 F.3d 228 (D.C. Cir. 2003). A belief that harsh conditions will deter misconduct may actually be *more* rational with respect to non-prisoners and prisoners in general population than those prisoners who are "incorrigible and recalcitrant." Certainly, the regulations struck down in *Turner* and *Martinez* could be quickly revived and justified on deterrence grounds just as easily as Petitioner's publication ban. Marriage and correspondence would be at least as powerful as newspapers and magazines as "incentives" in any attempt to modify behavior.

Applying *Turner* deference to a policy based on a general interest in deterrence not only undermines *Turner*, but also provides an extraordinary incentive for prison officials to enact the harshest restrictions. Under Petitioner's theory, the more miserable a restriction makes life for prisoners, the more likely it will deter, and therefore, the more likely it will be upheld as "reasonably related" to deterrence. *See* Br. for Pet. at 31 (arguing that "diminish[ing] the severity" of restriction will "diminis[h] its value . . . as a deterrent"); Br. for U.S. at 22 (arguing that potential long duration of deprivation enhances its deterrent effect); Br. for Council of State Governments at

18 (arguing that burden on right must be significant or it will have no deterrent effect). The Court can avoid this self-justifying result by either concluding that Petitioner may not deprive Respondents of First Amendment rights as a way to deter general misconduct or declining to apply *Turner* deference to Petitioner's interest in behavior modification.

B. The nature of Respondents' asserted right supports a heightened standard of review

Just last Term, the Court made clear that it may depart from *Turner* depending on the right at stake: "[W]e have applied *Turner*'s reasonable-relationship test *only* to rights that are inconsistent with proper incarceration." *Johnson*, 543 U.S. at 510 (emphasis in original) (internal quotation marks omitted). In upholding restrictions, the Court has similarly emphasized the extent to which the asserted right was fundamentally inconsistent with incarceration. For example, in *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), the Court upheld restrictions on prisoner visitation while noting that "freedom of association is among the rights least compatible with incarceration." *See also Jones*, 433 U.S. at 126. Thus, in determining whether *Turner* should apply to a particular regulation, the question is whether the right at issue is one "that need necessarily be compromised for the sake of proper prison administration." *Johnson*, 543 U.S. at 510.

The Court did apply *Turner* in *Thornburgh*, which involved restrictions on incoming publications. But in that case, there was a fundamental incompatibility between the restricted conduct – reading material that was "detrimental to security" – and the operational needs of the prison. *Thornburgh*, 490 U.S. at 415. *See supra* Part I.A. The nature of the deprivation was also different, as it only minimally limited the information prisoners could seek out.

Here, Petitioner's policy attempts to cut off Respon-

dents from all information about the outside world, which prevents them from being informed and engaged citizens. As the Court observed in *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), "speech concerning public affairs is more than self-expression; it is the essence of self-government." *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (noting that "informed public opinion is the most potent of all restraints upon misgovernment"). To deny prisoners all traditional outlets for learning about political affairs and other news is to deny their very citizenship -- *i.e.*, to say that because they are deemed "recalcitrant," their knowledge and understanding on matters of public affairs no longer matter.[4]

This Court made clear long ago that citizenship is not something that a prisoner forfeits upon incarceration. *See Trop*

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[4] In *Shaw*, 532 U.S. at 230, the Court stated, "the *Turner* test, by its terms, simply does not accommodate valuations of content." However, the question before the Court in *Shaw* was not whether the nature of the right is relevant, but whether First Amendment claims by "jailhouse lawyers" should be given heightened protection. *Id.* at 225. The Court declined to do so, at least in part because of the significant security problems granting such heightened protection would cause. *Id.* at 231 ("[E]ven if we were to consider giving special protection to particular kinds of speech based upon content, we would not do so for speech that includes legal advice," noting that prisoners often abuse legal assistance programs to pass contraband or communicate instructions regarding unlawful behavior). Simply granting prisoners some access to the news does not implicate the security concerns that were present in *Shaw*.

Further, as noted, the Court *has* considered the right at issue in particular cases, at least the extent to which the right is inconsistent with incarceration. *E.g.*, *Overton*, 539 U.S. at 131. Thus, *amici* respectfully request that the Court reconsider its broad statement in *Shaw* for a more context-sensitive approach. *See Central Virginia Community College v. Katz*, – U.S. –, 126 S. Ct. 990, 996 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"). To the extent that the Court concludes that *Turner* is incompatible with such an approach, this provides a further argument why the Court should not apply *Turner* in this case.

v. Dulles, 356 U.S. 86, 101 (1958) (holding that denationalization as punishment for crime violates Constitution in part because it "strips the citizen of his status in the national and international political community"). *See also Overton*, 539 U.S. at 138 (Stevens, J., concurring) ("'a criminal conviction . . . do[es] not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual'") (citation omitted). To the contrary, in a free society, any goal of rehabilitation must allow room for a prisoner to become educated about the affairs of his own country and the world in which he lives. Thus, like the right to equal treatment considered in *Johnson*, allowing prisoners to remain informed "is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." 543 U.S. at 511.[5]

It is entirely appropriate to consider the nature of the speech being suppressed in deciding what standard of review to apply. The Court has done so in various other contexts, even those in which it usually affords greater deference because of concerns about the operation of government. *E.g.*, *Connick v. Myers*, 461 U.S. 138, 152 (1983) (government may need a "stronger showing" of disruption to justify discipline of employee "if the employee's speech more substantially involved matters of public concern"). It is also likely that the nature of the speech at issue was a concern of the Court in *Martinez*, 416 U.S. at 415-16, in striking down a policy that censored statements by prisoners that "unduly complain," "magnify grievances," or express "inflammatory political, racial, religious or other views." Although one could plausibly

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[5] It scarcely needs mentioning that the policy restricts not only the rights of prisoners but also of any member of the press seeking to communicate with them. *Thornburgh*, 490 U.S. at 408 ("publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners").

believe that these kinds of statements could undermine prison security (whether included in incoming or outgoing mail), a stronger evidentiary showing was necessary because it is simply antithetical to the First Amendment to censor criticism of the government. It is similarly antithetical to free speech values to force ignorance and apathy on *any* segment of society, as Petitioner has done in this case.

Even if one accepts that the censorship in this case is incidental rather than purposeful, failing to give adequate consideration to the right at issue in this case will give prison officials carte blanche to act as censors in the future. Under the guise of "behavior modification," they may prohibit any form of speech they disfavor. Such censorship would still be "neutral" under *Turner* so long as the government could articulate a reason for believing that censoring the speech provided some "incentive" to better behavior. *See Thornburgh*, 490 U.S. at 415 (stating that prison regulation is "neutral" if it furthers interest "unrelated to the suppression of expression"). For example, would it not be reasonable to believe under Petitioner's logic that recalcitrant prisoners would be deterred by a policy that forbade them from complaining about prison conditions or from filing litigation challenging those conditions or their criminal convictions? *See Lewis v. Casey*, 518 U.S. 343, 361-62 (1996) (applying *Turner* standard to claim about court access). Certainly, these are forms of speech that prisoners consider to be very important and withdrawing their ability to engage in them would make their lives more miserable. The First Amendment could not tolerate such a ban and it cannot tolerate Petitioner's.

Both the nature of Petitioner's asserted interest and Respondents' asserted right require that there be a "closer fit" between the asserted interest in deterrence and the restriction imposed. Whether the Court applies a standard akin to *Martinez*, 416 U.S. at 414, requiring the government to show that its policy is "generally necessary" to further a legitimate

interest, or even a minimally heightened standard of review, this policy would certainly fail. Petitioner has provided absolutely no support for the propositions that depriving Respondents of newspapers and magazines will improve their behavior and that using any number of other approaches for behavior modification would not be at least as effective. Rather, Petitioner's only hope in this case is that the Court will simply afford unquestioning deference to his unsupported allegations.

II. EVEN UNDER *TURNER*, PETITIONER'S POLICY IS AN "EXAGGERATED RESPONSE"

If the Court does apply the test of *Turner v. Safley*, 482 U.S. 78 (1987), it should nevertheless affirm the Court of Appeals' decision. Part of the merit of the *Turner* test is its "express flexibility." *Thornburgh*, 490 U.S. at 414. Such flexibility–in particular, sensitivity to context– is essential if the Court applies *Turner* to all prison First Amendment challenges. This is especially true when the asserted interest is general deterrence. Because that rationale is potentially boundless, the Court must weigh each of the four factors carefully, lest prisoners' First Amendment rights be completely eradicated.

Turner itself illustrates this point. There, the Court upheld a restriction on prisoner correspondence while striking down a restriction on prisoner marriage. It certainly could be (and was) argued that it was "rational" for the government to believe that prisoner marriages would lead to problematic "love triangles" and would encourage dependency among some prisoners. The Court nevertheless concluded that the marriage restriction was an exaggerated response to the government's expressed concerns, despite the dissent's observations that the test would require that the marriage regulation be sustained if it were applied in the same manner as it had been to the ban on prisoner correspondence. *See*

Turner, 482 U.S. at 112-13 (Stevens, J., dissenting). However, these seemingly disparate results can be explained easily if one recognizes that application of *Turner* is sensitive to context, including the interest asserted by the government, the right claimed by the prisoner, and the severity of the deprivation of the right. Each of these factors demonstrates that Petitioner's policy is an exaggerated response to his stated concerns.

A. Banning all news and commentary is not logically connected with Petitioner's asserted interest in deterrence

Under the first *Turner* factor, a prison policy must have a valid, logical connection with a legitimate penological interest. 482 U.S. at 89. For the reasons discussed in Part I, *supra*, the Court should conclude that the attempt to modify prisoners' behavior by depriving them of information necessary to preserve their status as citizens is not a legitimate penological goal. However, even assuming that an interest in general deterrence is valid in this context, there is simply no logical connection between an interest in general deterrence and a denial of all news and commentary.

1. *The Court of Appeals did not err in evaluating the evidence*

Petitioner contends that the Court of Appeals imposed a "hostile scrutiny" on his policy, focusing primarily on the Third Circuit's consideration of the evidence that the parties presented to the district court. Br. for Pet. at 22-23, 27. In arguing that the court erred, Petitioner relies almost entirely on one sentence in *Overton*, 539 U.S. at 132: "The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." Petitioner, however, interprets this statement far too broadly. Even in non-prisoner cases, the ultimate burden is almost always on the party contending that

the regulation or statute is unconstitutional. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 17 (1988). But that does not mean that the government is completely relieved of all obligation to justify its decisions. Further, under *Turner*, the Court has assumed that the government has some burden to justify its actions, because the Court has never considered a rationale for a policy unless it was actually advanced by the government, unlike cases in which the Court has applied a rational basis analysis. *See Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (stating that, under rational basis review, challenging party has burden to negate "any reasonably conceivable state of facts that could provide a rational basis for the classification") (internal quotation marks omitted).

In practice, this Court has in many cases evaluated the evidence presented by the government. In *Turner*, 482 U.S. at 98, the Court found that the marriage restriction was an exaggerated response to security objectives, in part because the government's position was not supported by evidence. And in *O'Lone*, 482 U.S. at 345-46, 350-51, the Court carefully explained the long history of security problems that prevented officials from allowing prisoners to attend specific religious services. *See also Harper*, 494 U.S. at 226 & n.9 (citing evidence that "proper use of [anti-psychotic] drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior"); *Johnson*, 543 U.S. at 525-527 (Thomas, J., dissenting) (applying *Turner* and discussing evidence adduced by state that racial segregation is required by prison gang violence). Further, the circuits are in agreement that, at least in some circumstances, prison officials must come forward with evidence showing the connection between their interest and the restriction. *See King*, 415 F.3d at 639 (Posner, J.) ("the government must present some evidence to show that the restriction is justified"). *Accord*

Ashker v. California Dep't of Corrections, 350 F.3d 917, 922-23 (9th Cir. 2003); *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002); *Davis v. Norris*, 249 F.3d 800, 801 (8th Cir. 2001); *Flagner v. Wilkinson*, 241 F.3d 475, 486 (6th Cir. 2001); *Morrison v. Garraghty*, 239 F.3d 648, 660-61 (4th Cir. 2001).

Even assuming that it is appropriate to credit a "because we said so" argument by the government where there is a plain and indisputable relationship between the challenged restriction and the governmental interest, that assumption does not apply here for at least three reasons, all of which counsel in favor of requiring some showing that there is an actual fit between means and end.

First, as explained in Part I, Petitioner's behavior modification interest is ill-defined and does not implicate security. When safety is an issue, it is reasonable, even necessary, to allow prison officials to act before a problem arises. *See Turner*, 482 U.S. at 89. In these circumstances, prison officials have not only an interest, but also an obligation to protect those inside the prison, *Harper*, 494 U.S. at 225, and the consequences of an error may be so grave that more leeway should be allowed. *See, e.g.*, *Overton*, 539 U.S. at 129 (explaining security problems associated with increasing levels of visitation and prisoner drug abuse and drug smuggling); *Turner*, 482 U.S. at 91 (noting Missouri's "growing problem with prison gangs").

When the interest asserted is general deterrence, the need for deference to the judgment of prison officials is significantly diminished. No riot will occur if Respondents are allowed to read the news and no contraband will be smuggled into the prison. The most serious consequence will be that the cumulative unpleasantness of life on Level 2 will be reduced by the restoration of a single activity.

Second, there is no obvious link between banning current publications and rehabilitating prisoners. In some

cases, the connection between the interest being asserted and the restriction imposed is so clear that further evidence is simply unnecessary. *E.g.*, *Turner*, 482 U.S. at 91 ("Undoubtedly, communication with other felons is a potential spur to criminal behavior"). The connection between security and the marriage restriction was not so obvious in *Turner*, 482 U.S. at 97-98, and the Court appropriately concluded that more was required from the government than simple rote assertions.

Similarly, in this case, one cannot seriously argue that an obvious connection exists. Common sense does not support a belief that allowing prisoners to read newspapers and magazines will make them "act worse" in some undefined way, particularly when, according to Petitioner, they have already failed to respond appropriately after numerous other privileges were taken away. To the contrary, common sense, scholarship and Pennsylvania's own history suggest that intellectually isolating Respondents will have only a negative impact on their prospects of rehabilitation.[6] Thus, this is

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[6] A recent study by economists at Yale University and the University of Chicago refutes Petitioner's basic premise that imposing harsher conditions on prisoners will improve their behavior. M Keith Chen and Jesse M. Shapiro, *Does Prison Harden Inmates? A Discontinuity-based Approach* (2005), http://www.som.yale.edu/Faculty/keith.chen/papers/prison072405.pdf, at 1 ("We find that harsher prison conditions are associated with significantly more post-release crime"). *See also* Richard Morin, *Time In and Time Out*, Washington Post, Feb. 2, 2006, at A2 (summarizing study's findings). This study only confirms what Petitioner surely already knows through Pennsylvania's own failed and long discredited 19th century practice of attempting to "rehabilitate" prisoners by cutting off all contact with the outside world. Harry Elmer Barnes, *Evolution of Penology in Pennsylvania* (1968), 290-302; David J. Rothman, *Perfecting the Prison, in* Oxford History of the Prison, (Morris & Rothman, eds 1995), 111-29. *See also In Re Medley*, 134 U.S. 160, 168 (1890) (noting that "experience demonstrated . . . serious objections" to "complete isolation of [a] prisoner from all human society," including failure to "recover sufficient mental activity to be of any subsequent service to the community").

precisely the type of case in which prison officials can properly be required to come forward with evidence that their interests are being furthered by the practice at issue.

Finally, as explained below, Petitioner's position on the remaining *Turner* factors is extremely weak. The nature of multifactor tests means that the showing required for one factor depends on the relative strength of the others. For example, in *O'Lone*, there were severe security risks in allowing Muslim prisoners to attend Jumu'ah, risks which could not be diminished through lesser restrictions. 482 U.S. at 351 (noting that it would be "extraordinarily difficult" for officials to allow prisoners to attend service). Because the first, third and fourth factors favored the prison officials so strongly, the harsh nature of the restriction was not dispositive. In this case, where the restriction on the right is severe and the right can be easily accommodated without a significant impact on security or resources, it is proper to require a stronger showing from the government than just a "hope" that the restriction actually accomplishes its goal.

2. *Even if Petitioner was not required to adduce evidence, the policy is not logically connected to a legitimate penological interest*

Under any reasonable view of the facts, it is evident that "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. Common sense simply does not establish that prohibiting Respondents from reading news and commentary will somehow aid in their "rehabilitation." Long ago, both this Court and the Federal Bureau of Prisons recognized that rehabilitation of a prisoner is helped, not hindered, by maintaining communication with the outside world. *Martinez*, 416 U.S. at 412 & n.13 (citing BOP Policy

Statement).

Numerous other courts have similarly recognized the rehabilitative effects that reading has on prisoners and the harm that is caused by its deprivation. *Clement v. California Dep't of Corrections*, 220 F.Supp.2d 1098, 1110 (N.D. Cal. 2002), *aff'd*, 364 F.3d 1148 (9th Cir. 2004); *Morrison v. Hall*, 261 F.3d 896, 904 n.7 (9th Cir. 2001); *Spellman*, 95 F.Supp.2d at 1281; *Knecht v. Collins*, 903 F. Supp. 1193, 1200 (S.D. Ohio 1995), *rev'd on other grounds*, 187 F.3d 636 (6th Cir. June 15, 1999) (unpublished table decision); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034, 1036 (2d Cir. 1985). The few courts that have ruled on similar publication restrictions agree: there is no logical connection between a total ban on publications and improving prisoner behavior. *Jacklovich v. Simmons*, 392 F.3d 420, 429 (10th Cir. 2004); *Spellman*, 95 F.Supp.2d at 1281. *No* court has upheld a publication ban as restrictive as Petitioner's.[7]

It is particularly nonsensical to believe that the prisoners at issue in this case will improve their behavior as a result of a newspaper and magazine ban. By Petitioner's own assertion, Respondents are "recalcitrant and incorrigible:" most of these prisoners have already "flunked out" of other "level" programs that rely on deprivations of privileges to modify behavior. Br. for Pet. at 4. If Petitioner had no effect (or perhaps a deleterious effect) on Respondents' behavior by placing them in segregation and severely restricting their exercise, visitation, property and numerous other privileges (J.A. 90-102), there is no rational basis to believe that the

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[7] Those few courts upholding publication bans under a deterrence rationale have emphasized the limited duration of those bans, which never exceeded 60 days and which required that the prisoner receive all withheld publications following the period of confinement. *Little v. Norris*, 787 F.2d 1241, 1243-44 (8th Cir. 1986); *Daigre v. Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983); *Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985); *Guajardo*, 568 F. Supp. at 1366.

additional deprivation of magazines and newspapers will be more successful. Certainly, this belief is no more "rational" than the government's belief in *Turner* that restricting marriage rights of prisoners would help prevent "love triangles" and discourage prisoners from forming overly dependent relationships.

Policy in other prisons confirms the questionable logic of the newspaper and magazine ban. *See Martinez*, 416 U.S. at 414 n.14 ("policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction"); *Overton*, 539 U.S. at 134 (noting that "numerous other States have implemented similar restrictions on visitation privileges"). As noted by the Court of Appeals, no other segregated prisoners in Pennsylvania are completely denied newspapers and magazines, even those on death row. *Banks*, 399 F.3d at 143. Further, it appears that the vast majority of other states do not impose restrictions that are similar to the one at issue here. *Corrections Compendium*, High Level Security Inmates, September 2003, at tbl. 4 (surveying 37 states and 4 Canadian prison systems; only 3 limited reading of high security prisoners to books only); *see also Jacklovich*, 392 F.3d at 428 (citing expert report of former Secretary of Kansas Department of Corrections that bans on publications are rare).

As a matter of general policy, the Bureau of Prisons also does not ban newspapers and magazines. *See* 28 C.F.R. § 541.12 (stating that prisoners "have the *right* to a wide range of reading materials for educational purposes and for your own enjoyment. These materials may include magazines and newspapers sent from the community, with certain restrictions.") (emphasis added). Rather, under 28 C.F.R. § 540.71, BOP restricts reading materials only in number or on the basis of the potentially dangerous form or content of the material, even with respect to high security prisoners. Although prisoners in disciplinary segregation lose some privileges, the

regulation governing conditions of those prisoners does not limit the application of 28 C.F.R. § 540.71 with respect to newspapers and magazines. 28 C.F.R. § 541.21. *See also* United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners (1955), *cited in Estelle v. Gamble*, 429 U.S. 97, 103 n.8 (1976), Rule 39 ("Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration."); American Correctional Association, Standards for Adult Correctional Institutions (4th ed. 2003) ("Restriction to access [to publications] should be related directly to maintenance of institutional order and security.")

The LTSU's own track record dispels any lingering doubt regarding whether Petitioner's policy is a logical way to improve Respondents' behavior. Over a period of *2 ½ years*, only 10 prisoners have been moved from LTSU to other prisons. J.A. 138.[8] Two others were released directly back into the community when their sentences expired. *Id.* Petitioner concedes that "m`any" prisoners have remained on Level 2 the entire time that the LTSU has been in operation. J.A. 131-32. This suggests strongly that the great majority of Respondents will remain on Level 2 indefinitely, most likely

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[8] There is nothing in the record to suggest that it was the newspaper and magazine ban that led to the promotion of those 10 prisoners. Level 2 imposes a plethora of severe restrictions on prisoners, many of which may be viewed by Respondents as more burdensome than the publication ban. It is also quite possible that the prisoners who were promoted were motivated by factors unrelated to the harsh conditions or even that they had not in fact shown significant behavioral improvement. The first of five factors listed as considerations for promotion is "time in level." J.A 40. Thus, Petitioner may simply give up after a period of time.

until their sentences expire. Whatever "hope" that Petitioner had when the LTSU opened has been shown to be a false one.

B. The policy leaves Respondents with no alternatives for exercising their First Amendment rights

The second *Turner* factor is the severity of the deprivation, i.e., whether adequate alternatives remain for the exercise of the constitutional right. *Turner*, 482 U.S. at 90. Whether the Court defines the right at issue as the right to read newspapers and magazines, as the Court of Appeals did, the right to have some access to the news, or even more generally as the right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), the restriction imposed on Respondents is the most severe deprivation of prisoner First Amendment rights that this Court has ever considered. Then-Judge Alito conceded in his dissent that "[t]his is the most troubling of the four factors." *Banks*, 399 F.3d at 149.

The deprivation goes much further than a ban on subscribing to periodicals. Respondents are not only barred from subscribing to newspapers and magazines, but are prohibited from *reading* them: they may not get them from the general prison library or borrow them from other prisoners. J.A. 156, 163. If they are found with a newspaper or magazine, it is considered a disciplinary infraction. J.A. 156. Friends and family are even barred from clipping out individual articles and sending them to Respondents. J.A. 154-55. Respondents are also prohibited from owning a television or a radio or listening to or viewing a program in a prison common area. J.A. 102. They may not order *any* non-religious publications. *Id.* They are completely barred from watching, listening to and reading news and commentary.

Petitioner and his *amici* appear to suggest that the right at issue is no more than maintaining some contact, however

slight or restricted, with *someone* outside the prison, or being allowed to read *something*. They argue further that alternatives to this right remain because Respondents can receive letters and request books from the general prison library. Br. for Pet. at 30; Br. for U.S. at 28.[9] However, Petitioner's position both mischaracterizes the right at issue and adopts an exceedingly broad view of what constitutes adequate alternatives.

This Court has held that the right in a prisoner case should be viewed not just "expansively," but also "sensibly." *Thornburgh*, 490 U.S. at 417. One can always view a right at a higher level of generality. In *Turner*, one could have argued that the right to marry was simply part of the more general right of association and that the prisoners retained adequate alternatives because they were still permitted to maintain other types of relationships. In the First Amendment context, one could argue that if prisoners are allowed to speak at all, then this factor of *Turner* is satisfied.

However, neither these views nor Petitioner's are faithful to the Court's instruction to view the right sensibly, i.e., practically. In defining a particular right, the Court should consider what constitutional values are at stake and whether those values can still be adequately served if the right is viewed at a higher level of generality. In *Turner*, it would not have been proper for the Court to view marriage as simply one of many kinds of fungible relationships, because marriage has special personal, spiritual and legal significance that other relationships do not. 482 U.S. at 95-96.

Similarly, the Court should not view reading news and commentary as just one of many forms of reading material or one way to communicate with those outside the prison, with no more significance to free speech values than writing a letter to

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[9] To receive a book from the library, Respondents must know what to ask for in advance without the aid of a list or index. J.A. 165-69. They are limited to no more than two books at one time. J.A. 39, 169.

a pen pal or having a conversation with a prison employee. The press plays an essential role in keeping citizens informed of public affairs. This role is even more crucial for prisoners, who necessarily lose many ways to stay active and involved citizens while they are incarcerated.[10]

Petitioner's view of what constitutes adequate alternatives cannot be sustained. Its logic leads to the *reductio ad absurdum* that a prisoner's First Amendment rights are not implicated until he or she is locked in a cell 24 hours a day with absolutely no ability to communicate, thus effectively rendering the First Amendment meaningless absent an independent Eighth Amendment violation. *See Jones 'El v. Berge*, 164 F.Supp.2d 1096, 1120-21 (W.D. Wis. 2001) (recognizing Eighth Amendment claim for social isolation and sensory deprivation).

Moreover, Petitioner's view cannot be squared with this Court's precedents. In *Turner*, the Court invalidated a marriage restriction even though the regulation permitted marriages in some circumstances. With respect to First Amendment rights, the Court has held that alternative means of communication must be both "reasonable and effective." *Pell*, 417 U.S. at 826. And, in *Thornburgh*, the Court concluded that the policy provided sufficient alternatives because

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[10] The United States suggests that prisoners may stay informed because family members can read newspapers and magazines and provide summaries in their letters or during a visit. Br. for U.S. at 28. This far-fetched "alternative" is misguided for several reasons. First, many prisoners would likely be unsuccessful in finding someone both willing and able to provide such a service. Second, it would simply be impossible for anyone to prepare even a minimally adequate summary of public affairs and other news and commentary in a letter or a once-a-month conversation. Finally, to the extent that a prisoner *was* able to obtain the same information in newspapers and magazines through letters or visits, this would simply prove further that the policy was irrational. For if the prisoner was still getting the same information, there would no deprivation, and thus no "deterrent" effect.

it permitted "a broad range of publications to be sent, received, and read," and that "a more broadly restrictive rule" could "run afoul of the second *Turner* factor." 490 U.S. at 418, 417 n.15. These statements make clear that the complete ban on receiving any non-religious publications is overly restrictive.

Petitioner further argues that Respondents have the "alternative" of escaping the ban by getting promoted to Level 1. Br. for Pet. at 30. But this is not an alternative for exercising free speech rights any more than it was an alternative for the prisoners in *Turner* to regain their marriage rights by obtaining early release through good behavior. This Court has never analyzed the second *Turner* factor in the manner urged by Petitioner. The relevant question has always been: what alternatives does the prisoner have *while the restriction is in force*? It is no alternative to say that a prisoner may have rights again at some time in the future.

In any case, the ban is enforced against each prisoner for a *minimum* of three months, J.A. 32. And under Petitioner's own policy, the ban is *intended* to last much longer, J.A. 31 ("Placement is anticipated to be long term."), an intention on which Petitioner has carried through. J.A. 130, 138 (testimony of deputy superintendent that only ten prisoners had been promoted out of the LTSU in 2 ½ years and all but three LTSU prisoners were then on Level 2).

C. Accommodating Respondents' First Amendment rights will have no more than a *de minimis* effect on legitimate penological interests

The third and fourth *Turner* factors assess the impact on "guards and other inmates, and on the allocation of prison resources generally" that accommodating the right would have and the availability of "ready alternatives" to the restriction that would have no more than a "*de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 90-91.

Here, Petitioner's argument is at its weakest. Respondents are locked in their cells nearly around the clock, are excluded from all educational activities and other prison programs, may not work and earn money, may not buy items from the commissary, are denied all but the most minimal visiting privileges, and may not use the telephone except in emergencies. J.A. 32-33, 48, 102. They are excluded from even the additional privileges allowed to some Level 1 prisoners at the discretion of prison officials. J.A. 32-33. Yet Petitioner would have the Court believe that, in the face of all these other deprivations, letting the prisoners exercise the First Amendment right to read even a limited number of magazines and newspapers would undermine their rehabilitation and therefore prison security.

Arguably, the "costs" addressed by the third and fourth factors do not even encompass a state's interest in general deterrence. As stated by the Court in *Overton*, 539 U.S. at 135, the question is whether accommodation would "cause a significant reallocation of the prison system's financial resources" or "impair the ability of corrections officers to protect all who are inside a prison's walls." Where the interest asserted is neither security nor finances, these factors are a non-issue.

If the Court determines that the *Turner* framework does encompass "costs" to a behavior modification interest, it must limit either the weight it gives to the third and fourth factors or the deference it grants to the Petitioner's allegation that his ability to deter misconduct will be significantly impaired by accommodating the right. As explained in Part I, if one accepts Petitioner's premise that prohibiting Respondents from reading the news will improve their behavior, it follows that *any* accommodation of Respondents' First Amendment rights, no matter how small or easily granted, could potentially impair Petitioner's interest in behavior modification. Thus, almost by definition, there can be no "ready" alternative to the restriction,

making it impossible for prisoners to satisfy these factors, and giving prison officials carte blanche to deprive prisoners of any right they choose simply by alleging that the deprivation is part of a behavior modification plan.

The Petitioner has subjected Respondents to multiple, cumulative deprivations of the amenities of prison life. In the context of this massive deprivation of privileges, it is simply not credible that whatever rehabilitative or deterrent effect the sum of these deprivations may have will be significantly impaired by allowing Level 2 prisoners to read some small number of magazines and newspapers.

Thus, in *Turner*'s terms, the *de minimis* cost alternative is already in place. These numerous other restrictions are clearly sufficient to preserve Petitioner's asserted interest in using disincentives to modify behavior, absent any evidence that the newspaper and magazine ban contributes in any significant way to any deterrent effect of placement in Level 2.

Respondents are not being denied news because they have abused that right in the past. Petitioner has imposed the ban only because he believes it is yet another way to make life less pleasant for Respondents. It cannot be reasonably argued that lifting this single restriction will make the prison less safe or Respondents less likely to improve their behavior.

D. *Turner* is not toothless

This Court has recognized that "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). But if Petitioner's arguments are accepted, there will simply be nothing left of the First Amendment for prisoners. *Turner* itself will become obsolete. The Court will return to the long-abandoned "hands-off" philosophy, in which prisoners are deemed to have no First Amendment rights that the prison official is bound to respect. Only the Eighth Amendment will remain as a potential substantive limit on deprivations imposed

on prisoners. *See* J.A. 28 (in Petitioner's summary judgment materials before district court, stating that it is Eighth rather than First Amendment that "legitimately constrains the array of punishments, behavior incentives and forms of deprivation that the prison system can use to modify the behavior of recalcitrant inmates").

Such a result would flatly contradict this Court's statement that *Turner*'s "reasonableness standard is not toothless," *Thornburgh*, 490 U.S. at 414, as well as the repeated declarations over the past 30 years that prisoners do not sacrifice all of their First Amendment rights when they pass through the jailhouse gate. *E.g.*, *Shaw*, 532 U.S. at 228-29; *Thornburgh*, 490 U.S. at 407; *O'Lone*, 482 U.S. at 348; *Turner*, 482 U.S. at 84. *See also Overton*, 539 U.S. at 138 (Stevens, J., concurring) (rejecting view that *Overton* "signals a resurrection" of hands-off approach). The Court's review of prisoners' constitutional claims must be "responsive both to the 'policy of judicial restraint regarding prisoner complaints *and* [to] the need to protect constitutional rights.'" *Turner*, 482 U.S. at 85 (quoting *Martinez*, 416 U.S. at 406) (emphasis added). To do this, the Court must place some limit on the government's discretion to restrict constitutional rights under the guise of deterrence, or its promises to uphold prisoners' constitutional rights will be merely empty words.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX

INTERESTS OF AMICI CURIAE

The **American Civil Liberties Union** (ACLU) is a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The **ACLU of Pennsylvania** is a state affiliate of the ACLU.

The **Legal Aid Society** is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of the constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and conducts litigation on prison conditions.

People For the American Way Foundation is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civil and educational leaders, People For now has over 750,000 members nationwide who are dedicated to the democratic tradition of liberty and freedom embodied in this country's Constitution. One of the organization's primary objectives is to educate the public on the vital importance of these principles, and to defend them through litigation and other means as necessary. People For has frequently represented parties and filed amicus curiae briefs in similar cases and is vitally concerned with the threat to basic First Amendment freedoms posed by this case.

The **American Friends Service Committee** (AFSC), the social justice and peace organization formed by the Religious Society of Friends (Quakers) in 1917, has worked with prisoners, their families, and with prison officials since 1947. AFSC's work stems from the belief that the way a society treats people convicted of crimes is an indicator of the human values of that society and Quakers' belief in the intrinsic work of all human beings. Quakers not only founded AFSC, they also founded the penitentiary, institutions initially comprised of isolation units, the predecessors of today's supermax prisons. Through AFSC's criminal justice work, especially with programs developed to monitor the conditions in isolation units across the nation, AFSC believes that isolation units should be abolished because of the inhumane conditions that are endemic to these institutions and practices. AFSC has published a variety of reports and histories regarding control or isolation units, and its staff members have testified widely on the issue. In 1997, AFSC published a "Survivor's Manual," written by prisoners who survived isolation for other prisoners facing the same situation. The policies at issue would ban the "Survivor's Manual" and other AFSC publications promoting institutional change through nonviolent means.

California Prison Focus (CPF) is a nearly two decade old human rights organization that defends and advances the rights of prisoners in California, particularly those confined in super-maximum security units. CPF publishes a monthly newsletter, to which approximately 800 prisoners subscribe.